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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ANDRES LAMAR WILLIAMS, as Trustee, etc., Plaintiff and Appellant, v. NORTH AMERICAN TITLE INSURANCE COMPANY, Defendant and Respondent.	A131968 (Alameda County Super. Ct. No. RG06255389 & RG09456832)

I.

INTRODUCTION

Appellant Andres Lamar Williams, individually and as Trustee of the Andres Williams Trust dated June 25, 2004 (collectively, Williams), appeals from summary judgment entered in favor of respondent North American Title Insurance Company (North American). Williams filed suit against North American for bad faith and related insurance claims after Williams was sued by his neighbor Christopher Murphree (Murphree) for interference with Murphree's sewer line, which ran across Williams's property. Williams and North American had earlier settled a claim when it was learned that the Murphree sewer line was not disclosed at the time Williams purchased his property.

The pivotal issue on appeal is whether a previous release executed by these parties in conjunction with the settlement of Williams's earlier claim bars Williams's current

lawsuit against North American. Among other arguments, Williams contends North American's representative misrepresented the terms of the release and, as a result, he never understood that his earlier settlement with North American included a release of the "duty to defend [Williams] in a civil action concerning the encroachments." Williams claims that since the potential for coverage exists, summary judgment was erroneously granted. We conclude, as did the trial court, that the release bars the current lawsuit, and we shall therefore affirm the summary judgment.

II.

PROCEDURAL HISTORY

Williams was sued by Murphree on February 15, 2008, in the Alameda County Superior Court (case number RG06255389). The complaint alleged 12 causes of action all arising from a sewer line serving the Murphree residence that ran through a portion of Williams's property. The complaint noted that since Williams purchased his property in 2000, and Murphree purchased his adjoining property in 2001, the two have been mired in disputes between themselves, the prior owners of both parcels, the real estate sales agents, and Williams's title insurance company over the placement and rights associated with the sewer line. These disputes were alleged to have resulted in Williams receiving compensation relating to the Murphree sewer line in the amount of $22,000. Notwithstanding these payments, the complaint goes on to allege that Williams interfered with the Murphree sewer line in ways that obstructed its flow and the right of Murphree to the use of said line.

On June 10, 2009, Williams sued North American in the same court (case number RG09456832) for declaratory relief, insurance bad faith, and breach of contract. The complaint alleged that North American had a duty to defend and to indemnify Williams against the Murphree lawsuit, and that it has acted in bad faith in failing and refusing to do so.

North American filed a general denial to the Williams's complaint, including 16 affirmative defenses. The twelfth affirmative defense alleged that Williams's claims

asserted against North American had been previously settled and released, and therefore any recovery under the current complaint was barred.

Apparently, sometime thereafter, the two cases were ordered consolidated.[1] North American filed a motion for summary judgment on December 17, 2010, on the ground that all of the claims in Williams's complaint against North American were barred by a prior settlement entered into between Williams and North American which resulted in Williams being paid $23,500, and for which he had released North American from any further claims and liability arising out of the Murphree sewer line dispute.

Williams opposed the motion, and the matter was set for a hearing on March 10, 2011. Prior to the hearing date, a tentative ruling was issued by the trial court indicating an intention to grant the motion. The tentative ruling was not contested and became the order of the court on March 11, 2011. Judgment was entered in favor of North American on March 15, 2011. This appeal followed.

III.

THE MOTION FOR SUMMARY JUDGMENT

North American's motion for summary judgment and supporting papers included a historical record relating to the parties' dispute. It was uncontested that Williams was and is an attorney licensed to practice law in California since 1988. In September 2000, Williams purchased a residential property in Oakland located at 6741 Snake Road (the Property). At the time the Property was purchased, Williams also purchased a homeowner's title insurance policy from North American covering the Property (the Policy).

In May 2002, Williams made a claim to North American under the Policy relating to two separate conditions discovered on the property. One was the discovery of an

[1] The record on appeal does not contain an order consolidating the cases, but later filed pleadings bear both case numbers.

adjoining neighbor's (Murphree's) sewer line that crossed the Property.[2] In his May 9, 2002 letter tendering his claim, Williams explained that the existence of the neighbor's sewer line was not disclosed or noted in North American's title report, and that "[t]here is no easement."

North American responded to the claim by letter dated October 18, 2002. In that letter, North American confirmed that its investigation discovered that the neighbor's sewer line crossed a portion of the Property and connected to a line at the rear of the Property. The letter reported further: "Although there does not appear to be a recorded easement or right of way for the storm drain and the sewer line to traverse your property, it does appear *the City and your neighbor are asserting a right to do so*." (Italics added.) As a result, North American conceded the claim was proper under "Covered Risk number 4" of the Policy, "[t]o the extent you suffer any actual loss as a result of the existence of the storm drain and the sewer line . . . ." Covered Risk number 4 provided coverage when "[s]omeone else has an easement on the Land. . . ."

The October 18, 2002 letter went on to explain that North American essentially had seven options available to it under the Policy when it learns of a claim, including:

"(3) Bring or defend a legal action relating to the claim.

". . . . . .

"(5) End the coverage of this Policy for the claim by paying You Your actual loss resulting from the Covered Risk, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay . . . ."

The letter went on to advise Williams that North American might exercise its right under the policy to pay his losses and terminate further coverage for the claim: "Consistent with paragraph 4 of the Conditions section of the Policy, [North American] may exercise its option to pay the loss compensable under the terms and conditions of the Policy. The measure of the loss compensable under the Policy is the market value of

[2] The other condition was the apparent existence of a storm drain maintained by the City of Oakland that traversed the rear of the Property. Because this claim does not form the basis of the current dispute we do not discuss it in detail.

your property with the existence of the covered matters and the value of the property without the existence of the covered matters, based on the use to which the property is being devoted on the date of the discovery of those matters. [Citation.] *By so exercising this option* [*North American*] *terminates any defense obligation under the Policy.*" (Italics added.)

The letter then informed Williams that North American was retaining an appraiser to assess any diminution in value to his property attributable to the storm drain and sewer line, and that a copy of the appraiser's report would be provided to Williams.

North American wrote again to Williams on December 12, 2002, confirming that it had sent him a copy of the appraiser's report concluding that the diminution in value to Williams' property attributable to the City of Oakland's storm drain and the sewer line "that runs from your neighbor's house and connects to the sewer line at the rear of your house" to be $4,500. The letter tendered a check in this amount, telling Williams that the tender "was without prejudice to your right to assert that the value is greater than $4,500[] and without prejudice to your right to assert and pursue any other claims you may have under the policy."

The parties had a telephone conference during which Williams advised North American that he disagreed with the appraiser's conclusion that his loss was only $4,500. North American wrote again to Williams on December 18, 2002, advising him that if he disagreed with the appraiser's report, he could send information supporting his view as to the value of the loss, or the parties could submit the dispute to arbitration.

Williams sent a six-page, single-spaced letter to North American on December 26, 2002, attacking in detail North American's position at to the value of his loss, and complaining about the long delay by North American in investigating and resolving his claim. Near the conclusion of his letter Williams implored North American to settle under threat of litigation if it did not do so: "Surely, there must be a reasonable man or woman at [North American] with good business judgment, who is willing to work toward an informal resolution. To this end, I am prepared to resolve this matter for $23,500, minus the $4,500 unilaterally tendered by [North American] . . . . [¶] I cannot afford

further delay. My health, safety and welfare are at stake, in addition to the substantial damages which I have already incurred and which are continuing. Consequently, I must have your response by January 2, 2003."

The letter concluded by informing North American that, absent a settlement, Williams intended "to bring a civil action against you and others for breach of contract, abstractor's negligence, insurance bad faith, the tort of another,[3] and such other causes of action as appropriate under the law."

North American agreed to pay the demanded amount, and on January 7, 2003, sent an additional check for $19,500 to Williams. The accompanying cover letter also enclosed a release to be signed by Williams, noting that the settlement was "in full settlement and resolution of your claim of loss on account of the City of Oakland's storm drain and your adjoining neighbor's sewer line easements affecting your property under the title policy."

Williams signed the release. The title of the document was "FULL SETTLEMENT AND RELEASE OF ALL CLAIMS." The recitals included that Williams "desires to resolve and compromise any and all claims relating directly and indirectly to the Easements[4] he may have against [North American] under the Policy."

The release also included several provisions describing the breadth and scope of the actual and potential claims being released as a result of the settlement:

"3. [Williams] fully releases and forever discharges [North American] . . . from and against any and all claims, demands, liabilities, obligations, actions and causes of action of any kind or nature whatsoever relating directly or indirectly to the Easements

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[3] Williams's reference to the doctrine of "tort of another" was supported by a citation to and quote from *Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618 ["A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred"].) (*Id.* at p. 620.)

[4] The "Easements" are defined elsewhere as including "a sewer line easement in favor of an adjoining landowner, whose property is located on 6733 Snake Road, Oakland, California, affecting the subject property."

. . . and any and all claims or causes of action in any way relating to or arising out of the handling of the claims of [Williams] including claims of bad faith, lack of good faith, unfair practices of every kind or character, including but not limited to alleged violations of California Insurance Code section 790.03.

"4. It is understood by [Williams] that the facts and acts that he believes to exist with regard to the Release may turn out to be other than or different from facts and acts as he understands them today and that there may be other facts and acts not known to him or believed by him to be true. [Williams] expressly assumes the risk of any and all acts and facts subsequently turning out to be different and this Release shall be effective and not subject to termination, rescission, or modification by reason of any such difference in fact or facts.

". . . . . .

"6. To the extent that Civil Code section 1542 of the State of California may be applicable to this Release, [Williams] waives, to the full extent permitted by law, Civil Code section 1542 and any purported right to rely thereon. Civil Code section 1542 reads as follows: [¶] 'A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.' [¶] This Release shall act as a release of all future claims that arise out of or in any way relate to matters released hereby whether such claims are currently known, unknown, foreseen or unforeseen. [Williams] understands and acknowledges the significance and consequence of such specific waiver of Section 1542 and hereby assumes full responsibility for any injuries, damages, losses, or liabilities that he may incur from the above-specified claim."

Lastly, the document disavowed any reliance by Williams on any written or oral statement by North American not specifically incorporated into the release:

"11. . . . . .

"(b) [Williams] has not relied upon any statement, representation, or promise, oral or written of [North American] except as expressly set forth herein. Any representation,

warranty, promise or condition, whether written or oral, not specifically incorporated herein shall not be binding upon any of the parties hereto."

North American's motion for summary judgment claimed that Williams's causes of action for declaratory relief, insurance bad faith and breach of contract had no merit because Williams "has settled and/or released and/or discharged those claims and relief." Williams filed an opposition to the motion for summary judgment on February 28, 2011. His principal position was that, regardless of the content of the written documents, Williams was assured by the North American representative with whom he had been corresponding, attorney Charles Carlisle, that the settlement would not affect his coverage under the Policy in the event he was later sued in connection with the encroachments. He also claimed that the settlement was not a bar to his current demand for a defense and indemnity because North American failed to advise him that the neighbor "refused to abandon the lateral sewer line under the premise of a prescriptive easement . . . ." These matters constituted fraud thereby voiding the agreement because it lacked mutual assent.

Alternatively, Williams raised a defense to the release contending that North American breached several statutory duties owed to him including California Code of Regulations, title 10, section 2695.4, subdivision (e), which required North American to explain the legal effect of the release to him where the release extended to matters beyond the subject matter giving rise to the claim.

North American filed a reply brief along with written objections to a number of statements made by Williams in his declaration filed in opposition to the motion. Most relevant here, North American objected to Williams's statements that he was given oral assurances by Carlisle, North American's representative, that, in the event litigation resulted from the dispute over the sewer line, the settlement would not bar a future claim for defense and indemnity. Williams additionally claimed that North American had misrepresented the terms of the settlement to him (Objection Nos. 1, 5, 9, 10 and 11).

As already noted, the trial court issued a tentative ruling, which became the final decision when neither side contested it. That written final order was issued on March 10,

2011, and granted North American's motion for summary judgment. The court found that the terms of the settlement, as embodied in the release agreement, were clear and unambiguous and included a release by Williams of the claims now being asserted against North American in his complaint. Because the release was clear and unambiguous, the court ruled that the parol evidence presented in Williams's declaration was inadmissible to vary the terms of that agreement. Accordingly, the court sustained North American's objections to those portions of Williams's declaration that varied with the written release or referred to alleged promises that were inconsistent with the written release.

III.

DISCUSSION

A. Standard of Review

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843 (*Aguilar*).) Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . ." (Code Civ. Proc., § 437c, subd. (c).)

A defendant who moves for summary judgment bears the initial burden to show that the action or cause of action has no merit—that is, "that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subds.(a), (p)(2).) When the burden of proof at trial will be on the plaintiff by a preponderance of the evidence, the moving defendant "must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence' " to support a necessary element of the cause of

action. (*Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990, 1003, quoting *Aguilar, supra*, 25 Cal.4th at p. 854; see *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334 (*Guz*).)

If the defendant fails to meet this initial burden, it is unnecessary to examine the plaintiff's opposing evidence; the motion must be denied. (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 59-60.) However, if the defendant makes a prima facie showing that justifies a judgment in its favor, the burden then shifts to the plaintiff to make a prima facie showing that there exists a triable issue of material fact. (*Aguilar, supra*, 25 Cal.4th at p. 850.) "The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).)

On appeal, we conduct a de novo review of the record to "determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law. [Citations.]" (*Guz, supra*, 24 Cal.4th at p. 334; see *Daly v. Yessne* (2005) 131 Cal.App.4th 52, 58.) We apply the same procedure used by the trial court: We examine the pleadings to ascertain the elements of the plaintiff's claim; the moving papers to determine whether the defendant has established facts justifying judgment in its favor; and, if the defendant met this burden, plaintiff's opposition to decide whether he or she has demonstrated the existence of a triable issue of material fact. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 84-85; *Varni Bros. Corp. v. Wine World, Inc*. (1995) 35 Cal.App.4th 880, 887.)

We recognize that summary judgment " 'is a drastic measure which should be used with caution so that it does not become a substitute for trial.' " (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp*. (1992) 6 Cal.App.4th 603, 610, quoting *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1420; see *Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 159.) Consequently, "[i]n performing our

de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [plaintiff's] evidentiary submission while strictly scrutinizing [defendant's] own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor. [Citations.]" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) "We need not defer to the trial court and are not bound by the reasons for the summary judgment ruling; we review the ruling of the trial court, not its rationale." (*Knapp v. Doherty*, *supra*, 123 Cal.App.4th at p. 85.)

B. Analysis of Issues Raised on Appeal

A de novo review of the trial court's ruling granting summary judgment in favor of North American necessarily examines whether the claims asserted by Williams in his complaint were released as part of the earlier settlement between the parties. If North American has satisfied its burden on this issue, then we must also examine whether Williams has raised an admissible issue of material fact that would render the written release unenforceable so as not to bar the current claims.

The principle goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time they entered into the contract. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; *Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865; see also Civ. Code, § 1636.) That intent is interpreted according to objective, rather than subjective, criteria. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126 (*Wolf*).) When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement. (Civ. Code, §§ 1638 ["language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"]; *id*. at § 1639 ["[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"].) The words are to be understood "in their ordinary and popular sense" (*id*. at § 1644) and the "whole of [the] contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other" (*id*. at § 1641).

" ' "When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over. [Citation.]" ' " (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 524, citing *Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1448.)

In applying these guiding legal principles to the issue raised by Williams, we conclude, like the trial court, that the terms of the release agreement executed by Williams in conjunction with his earlier settlement with North American could not have been clearer and precluded Williams from claiming North American had any duty to defend or to indemnify him in connection with the Murphree lawsuit. The release recitals included that Williams was settling "*any and all claims relating directly and indirectly* to the [sewer line] he may have against [North American] under the Policy." (Italics added.)

The agreement also included additional provisions describing the full scope of the actual and potential claims being released as a result of the settlement:

"3. [Williams] fully releases and forever discharges [North American] . . . from and against any and all claims, demands, liabilities, obligations, actions and causes of action of any kind or nature whatsoever relating directly or indirectly to the Easements . . . and any and all claims or causes of action in any way relating to or arising out of the handling of the claims of [Williams], including claims of bad faith, lack of good faith, unfair practices of every kind or character, including but not limited to alleged violations of California Insurance Code section 790.03."

This language is certainly unambiguous and broad enough to reveal Williams's intent to release any right he might have to a defense or to indemnity against Murphree's later lawsuit alleging interference with the use of his sewer line.

The terms of the parties' agreement are further evidenced by the correspondence Williams received from North American leading up to the signing of the release. In its initial letter to Williams following tender of his claim concerning the sewer line, North American enumerated the options available to it in resolving the claim, including the one

it ultimately selected, to wit, "[e]nd[ing] the coverage of this Policy for the claim by paying You Your actual loss resulting from the Covered Risk, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to Pay. . . ." If North American chose to pay the claim and end coverage, the letter made clear that "[b]y so exercising this option [North American] terminates any defense obligation under the Policy."

Once the parties began negotiations with the goal of settling the sewer line and storm drain claims, Williams wrote to North American on December 26, 2002, stating that he would be willing to "resolve this matter" by a payment of $23,500. Absent a settlement, Williams threatened "to bring a civil action against you and others for breach of contract, abstractor's negligence, insurance bad faith, the tort of another, and such other causes of action as appropriate under the law." Despite North American's agreement to settle and pay Williams the demanded amount, Williams has now done the very act he told North American he was willing to forego if the matter was settled—suing it for further relief under the Policy, including bad faith, arising out to his dispute with his neighbor concerning the sewer line easement.

Despite the clarity of the release and related documents, Williams contends that North American is nonetheless liable to him for a defense and potential indemnity against Murphree's lawsuit, under several provisions of the California Code of Regulations, including title 10, section 2695.4, subdivisions (a) and (e). These regulations indicate a strong public policy requiring an insurer to affirmatively disclose all benefits, coverage, time limits or other provisions of any insurance policy that may apply to the claim and embody a duty to treat an insured in good faith. Not only is there no factual support for the alleged regulatory violations, there is no evidence that any such violations prejudiced Williams in connection with the settlement and release.

Most importantly, Williams cites no legal authority that any such alleged violations, if proved, would provide a legal defense to a release clear on its face in relationship to the asserted claim. In fact, the contrary is true. Alleged violations of

these regulations do not give rise to a private right of action. (*Rattan v. United Services Automobile Assn.* (2000) 84 Cal.App.4th 715, 724.)

As to Williams's contention that he was assured the settlement and release would not affect his right to later be defended and indemnified if he were sued, parol evidence is inadmissible to vary or contradict the clear and unambiguous terms of a written, integrated contract (Code Civ. Proc., § 1856, subd. (a); *Wolf, supra,* 162 Cal.App.4th at p. 1126). " 'An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.' [Citation.] In California, the rule is embodied in Code of Civil Procedure section 1856, which states that "[t]erms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." ' [Citation.]" (*Alling v. Universal Manufacturing Corp*. (1992) 5 Cal.App.4th 1412, 1433.)

Indeed, appellate courts have consistently excluded evidence that the party seeking to enforce a contract made promises inconsistent with the contract. (*Bank of America v. Lamb Finance Co.* (1960) 179 Cal.App.2d 498 [promise that defendant would not have any personal liability on the note]; *Banco Do Brasil, S.A. v. Latian, Inc*. (1991) 234 Cal.App.3d 973 [promise to extend a line of credit as inducement to sign a personal guaranty]; *Alling v. Universal Manufacturing Corp., supra,* 5 Cal.App.4th at pp. 1433-1435 [promise to comply with terms of business plan specifically excluded from contract]; *Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 873 [representation contract could be terminated early without penalty].)

Additionally, Williams specifically agreed to waive the rights conferred by Civil Code section 1542 (section 1542). Section 1542 reads as follows: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

The agreement entered into by the parties specifically referred to Civil Code section 1542. "6. To the extent that Civil Code section 1542 of the State of California

may be applicable to this Release, [Williams] waives, to the full extent permitted by law, Civil Code section 1542 and any purported right to rely thereon."

There is additional language in the release that made it clear that Williams was expressly and intentionally waiving all unknown, unsuspected and unanticipated claims. For example, paragraph 4 of the release states as follows: "4. It is understood by [Williams] that the facts and acts that he believes to exist with regard to this Release may turn out to be other than or different from facts and acts as he understands them today and that there may be other facts and acts not known to him or believed by him to be true. [Williams] expressly assumes the risk of any and all acts and facts subsequently turning out to be different and this Release shall be effective and not subject to termination, rescission, or modification by reason of any difference in fact or facts."

With regard to claims outside the parties' contemplation, the agreement goes on to state: "6. . . . This Release shall act as a release of all future claims that arise out of or in any way relate to the matters released hereby whether such claims are currently known, unknown, foreseen or unforeseen. [Williams] understands and acknowledges the significance and consequence of such specific waiver of Section 1542 and hereby assumes full responsibility for any injuries, damages, losses, or liabilities that he may incur from the above-specified claim."

Lastly, as we have already noted, Williams agreed in the release that he was not relying on any written or oral statement by North American about the scope of the release not specifically incorporated into the release:

"11. . . . . .

"(b) [Williams] has not relied upon any statement, representation, or promise, oral or written of [North American] except as expressly set forth herein. Any representation, warranty, promise or condition, whether written or oral, specifically incorporated herein shall not be binding upon any of the parties hereto."

The facts, procedural posture, and issues of *Winet v. Price* (1992) 4 Cal.App.4th 1159 (*Winet*), mirror those in this appeal and support the trial court's grant of North American's motion for summary judgment. In *Winet*, as in the present case, the parties

settled a lawsuit and negotiated a general release as part of that settlement. However, years after executing the release, one of the releasing parties instigated a second lawsuit that fell within the scope of the release. The defendant in *Winet* moved for summary judgment in the second action based on the release obtained in settlement of the first action. Like the release at issue here, "[i]n no fewer than three distinct places the parties declared their intention to release each other from *all* claims, known and unknown, suspected or unsuspected . . . ." (*Id*. at p. 1166, original italics.) Also, like Williams, the plaintiff in *Winet* expressly waived the protections of section 1542. (*Id.* at pp. 1163-1164.)

In affirming the grant of summary judgment, the *Winet* court indicated that "[t]hose engaged in contract law and litigation are in great need of the availability of ironclad and enforceable general releases." (*Winet, supra*, 4 Cal.App.4th at p. 1173.) The release in *Winet*, like the release in this case, "is about as complete, explicit and unambiguous as a general release can be." (*Ibid*.) Just as in *Winet*, "[o]ur decision to uphold the release and enforce it in accord with its literal terms is in harmony . . . with a beneficial principle of contract law: that general releases *can* be so constructed as to be completely enforceable." (*Ibid.*) In so holding, the *Winet* court indicated that the release accomplished its "primary purpose" of enabling the "parties to end their relationship and permanently terminate their mutual obligations." (*Id.* at p. 1162.) The present release accomplishes that goal as well.

Yet, despite the undisputed fact that the release contained an integration clause, Williams argues that the bar against the use of parol evidence to vary, add to, or alter the terms of an integrated written agreement does not apply because the release was procured

by misrepresentation on the part of North American.[5] Specifically, he claims that he was told during the negotiations with North American that Williams would be defended against any future lawsuit concerning the "encroachments" if he were to be later named as a defendant. For this reason, he claims that North American misrepresented the scope of the release to him.

However, it is well settled that the fraud exception to the parol evidence rule does not apply if the evidence is offered to show an allegedly false promise which is directly at variance with the terms of the written agreement. (*Bank of America, supra*, 4 Cal.2d at p. 263; *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 346-347; *Wang v. Massey Chevrolet, supra*, 97 Cal.App.4th at p. 873; *Alling v. Universal Manufacturing Corp., supra*, 5 Cal.App.4th at p. 1436; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 419. As our Supreme Court has sensibly explained, "Our conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and *not a promise directly at variance with the promise of the writing*." (*Bank of America, supra*, 4 Cal.2d at p. 263, italics added.) In the court's view, to allow a writing to be vitiated by parol evidence which contradicts the terms of the writing " 'would be to open the door to all evils that the parol evidence rule was designed to prevent.' [Citations.]" (*Id.* at p. 264.)

The parties' release was unequivocal in stating Williams fully released North American "from and against any and all claims, demands, liabilities, obligations, actions

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[5] Williams's opening brief appears to rely on the so-called fraud exception to the parol evidence rule (*Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258 (*Bank of America*), while his reply brief seems to argue that a different exception applies; parol evidence is admissible to explain an ambiguity in the written agreement. (*City of Hope National Medical Center v. Genentech, Inc*. (2008) 43 Cal.4th 375, 395.) An issue raised for the first time in a reply brief will not be entertained on appeal. (*Mansur v. Ford Motor Co*. (2011) 197 Cal.App.4th 1365, 1387-1388 ["arguments raised for the first time in a reply brief [will not be considered], because it deprives [respondent] of the opportunity to respond to the argument"].)

and causes of action of any kind or nature whatsoever relating directly or indirectly to the Easements . . . ." Williams also agreed that he "has not relied upon any statement, representation, or promise, oral or written of [North American] except as expressly set forth herein." Consequently, Williams cannot recover on a fraud theory, premised on an alleged oral statement promising a defense in any third-party action regarding the easement, when such a promise is clearly at variance with the terms of the parties' written integrated agreement.

In conclusion, we hold that North American made a prima facie case that all of Williams's current claims were barred by the release and settlement entered into between the parties, and Williams did not raise an admissible triable issue of material fact to the contrary. Accordingly, the trial court's grant of North American's motion for summary judgment was proper.[6]

IV.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to North American.

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RUVOLO, P. J.

We concur:

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REARDON, J.

_____
SEPULVEDA, J.*

[6] Williams also challenges the release by charging that there was a failure of consideration. This is plainly incorrect, as North American paid Williams a total of $23,500, in part, to end its legal and contractual responsibilities to provide him with a defense and indemnity in any future civil action between his neighbor Murphree and himself.

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.